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No. 64, Original

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

EXCEPTIONS OF THE STATE OF MAINE TO THE REPORT OF THE SPECIAL MASTER FILED OCTOBER 4, 1975, AND BRIEF IN SUPPORT OF EXCEPTIONS

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STATEMENT OF THE CASE

The lateral ocean boundary between the State of Maine and the State of New Hampshire has been in dispute for many years. In 1971 an effort to settle the boundary dispute by interstate compact was begun. At that time a boundary commission containing representatives appointed by each state was established to agree upon a boundary for approval of their respective legislatures and ultimately for submission to the United States Congress for acceptance as an interstate compact. After extended negotiations the commission was unable to agree upon an acceptable line.

In 1973 a series of enforcement incidents occurred which brought the states to the brink of physical confrontation in what has been characterized as the "lobster war." At this point boundary negotiations were abandoned and the State of New Hampshire petitioned for Leave to File a Complaint to fix the lateral marine boundary of New Hampshire and Maine in the Atlantic Ocean between Portsmouth Harbor and Gosport Harbor. On October 9, 1973, the motion was granted, 414 U.S. 810, and the case was referred to a Special Master on November 5, 1973, 414 U.S. 996.[1]

At the outset of the proceedings before the Special Master the divergence of the boundary contentions of each state created a disputed area of several thousand acres of land. In preparation for trial both states submitted pretrial memoranda and undertook to develop the relevant facts.

During a pretrial conference in April of 1974 the Special Master urged the states to resolve their boundary dispute without further extensive development of the evidence. Pursuant to the Special Master's request, counsel for the states met to consider the principles of law and findings of fact which could provide a basis for a boundary which could be submitted in a consent decree. As a result of their deliberations, the parties prepared and presented a Motion For Entry of Judgment, Motion to Amend Motion For Entry of Judgment by Consent and a Proposed Draft of a Final Decree to the Special Master. (App., pp. 14, 20, 24) During this time the States of Maine and New Hampshire were engaged with the United States in another case of original jurisdiction, *United States v. Maine*, 420 U.S. 515 (1975) which presented some common

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1 Subsequent to the time this case was referred to a Special Master, the boundary commission met to discuss a possible political settlement. When continued efforts to negotiate a boundary proved fruitless, the attempt was totally abandoned.

issues. For that reason the United States was provided notice of the consent decree and permitted to participate in its formulation. The United States reviewed the Motion for Entry of Judgment by Consent as amended and indicated that it had no objection to its entry. (App., p. 29)

On October 4, 1975, the Special Master issued his report rejecting the consent decree and submitting his determination of the location of the lateral ocean boundary for approval of the Court.

EXCEPTIONS

The State of Maine excepts to the following findings and conclusions in the Master's Report:

1. The consent decree should be rejected. (Report, pp. 3-4)

2. Thalweg should not be used to determine the "mouth of the harbor," "middle of the river" and "middle of the harbor." (Report, p. 41)

SUMMARY OF ARGUMENT

The Court's authority under Article III of the Constitution permits entry of consent decrees achieved in cases of original jurisdiction. That authority is limited only when the consent decree does not achieve a permanent resolution of the dispute by application of legal principles to the relevant facts of the case. The Court has the authority to enter the consent decree submitted by the States of Maine and New Hampshire in this case because it is a final, binding resolution of the boundary dispute between the parties which was obtained after application of appropriate legal principles to the facts which the parties had developed prior to submission of the decree. Moreover, if the court finds that the form of the consent decree is defective, the proper remedy is not outright rejection of the decree. The Court should permit the parties the opportunity to correct the form by referring the decree back to the Special Master.

In any event, the boundary line in the proposed decree should be accepted by the Court because it results from the application of the only principles appropriate to the interpretation of the decree issued by the King of England in 1740.

ARGUMENT

I. THE SPECIAL MASTER ERRONEOUSLY REJECTED THE PROPOSED CONSENT DECREE.

A. This Court Has Authority to Enter The Consent Decree.

Although the Master rejected the decree, he decided that the decree should be submitted for the Court's consideration (Report p. 3) and accepted, if his reasons for rejecting it were erroneous. (Report p. 4)

The Special Master's rejection of the decree is based on the decision of this Court in *Ver nt v. New York*, 417 U.S. 270 (1974), which rejected a decree that constituted "mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Article III functions." (Report p. 3) The Master has interpreted the *Vermont* decision as authority for his view that Article III does not authorize the Supreme Court to accept consent decrees in cases it has accepted under its original jurisdiction. In the Master's view, any settlement of the parties would circumvent the procedures for establishing interstate compacts pursuant to Article I § 10 of the Constitution (Report p. 3). The effect of the Special Master's decision is that litigation to judgment is the only alternative to agreement through interstate compact.

Nothing in the Court's opinion in *Vermont v. New York* denies the authority of the Court to enter consent decrees in cases of original jurisdiction. In that case the Court rejected a consent decree which required appointment of a Special Master to continue to police the situation which had given rise to the dispute. The Court rejected the arrangement because it required a court to act in an arbitral rather than a judicial manner. at 277. The Court also objected to the decree in the *Vermont* case because the Special Master's decision was not an exercise of judicial power under Article III, which it described as "the application of principles of law or equity to facts distilled by hearings or by stipulations." at 277. If it had intended to deny its authority to enter consent decrees, the Court would have done so directly without the lengthy explanation of what constitutes a proper exercise of its Article III functions.

Because it did not deny its authority to enter consent decrees, the only implication which can be drawn is that it never questioned that authority.

Although precedent for the exercise of this Court's authority to enter consent decrees in original acti ns is not extensive, the Court has indicated it has this authority by its actions in prior cases of original jurisdiction.

The original papers on file with this Court in *Wisconsin v. Illinois*, 388 U.S. 426 (1967), October term 1966, Nos. 1, 2, 3, and 11 Orig., indicate that all the parties, including the United States, filed a Joint Motion and Proposed Decree four months after the Master had filed his report. The Joint Motion disagreed with certain aspects of the Master's legal conclusions and reserved certain legal issues he had decided for future proceedings. The motion also contained assurances that the parties would not raise the open legal questions absent a substantial change in circumstances. This Court entered the decree accepting the Master's findings of fact but not his legal conclusions. The court notes that the Master's legal conclusions need not be considered since the parties had agreed on the form of decree. Thus in *Wisconsin* this Court, without questioning its authority to do so, entered a consent decree which the parties proposed to avoid adjudication of certain legal issues decided by the Special Master.

In *Arizona v. California*, 373 U.S. 546 (1963) the Court indicated its preference that states settle their controversies by agreement, but recognized that this Court does have a serious responsibility to adjudicate cases where there are actual existing controversies. at p. 564. In the course of its adjudication of the legal rights of the parties to use the waters of the Colorado River, the Court addressed a compromise agreement regarding the use of the waters of the Gila River which had been submitted to the Special Master by Arizona and New Mexico. Noting that the Master had incorporated the compromise in his findings and conclusions, and that the parties had not taken exceptions to his Report, the Court accepted the decree. at 394-395. See also *United States v. Swift & Co.*, 286 U.S. 106, 114, 115 (1932).

Since the Master's decision is not supported by *Vermont v. New York* and is directly contradicted by the actions of this Court in other cases of original jurisdiction, this Court should find that the Master is in error, and then follow the Master's recommendation by accepting the decree.

B. The Application of Vermont v. New York Does Not Require Rejection of the Proposed Consent Decree.

In *Vermont v. New York*, 417 U.S. 270 (1974) this Court rejected a consent decree because it was not a final, binding determination of the underlying legal dispute between the parties, but rather an accommodation which required the Court to act "more in an arbitral than a judicial manner." at p. 277. In addition, the Court objected to the *Vermont* decree because it was reached in a manner outside the judicial power of Article III which requires "application of principles of law or equity to facts distilled by hearings or by stipulations." at p. 278. Neither of the objections which led to the rejection of the *Vermont* decree apply to the decree submitted by Maine and New Hampshire in this case.

The decree in this case is a binding determination which was submitted to achieve a conclusive termination of the long and often disruptive boundary dispute between the two states. In no way does entry of this decree require the Court to act as arbiter of present or future boundary rights in the disputed area. For this reason alone the rule announced in *Vermont v. New York* does not require rejection of the decree submitted by Maine and New Hampshire.

The *Vermont* rule does not apply to this consent decree for the additional reason that it was based entirely upon the application of principles of law and equity to the facts developed by the parties. In conference with the Special Master and consultation with the United States Government, the States of Maine and New Hampshire chose and applied the legal principles which were most appropriate for the interpretation of the 1740 decree which established the location of their lateral boundary. On the basis of the decisions of this Court, the opinions of international lawyers and evidence of the understanding of the concept in 1740 when the decree was issued, the States decided that the doctrine of thalweg was the only principle which could be applied to determine "the middle of the river," "mouth of the harbor," and "middle of the harbor" as described in the King's decree. Moreover, the States determined that the "special circumstances" rule dictated a straight line to constitute the boundary between Portsmouth and Gosport Harbors. Finally the States determined that the end points of the straight line should be the end of the natural channel in the mouth of both harbors. To determine the natural end of the channel Maine and New Hampshire undertook extensive surveys of the bottom. The proposed consent decree was the result of the application of these principles to the facts as they had been developed by the States at the time it was submitted. It is clear from the process undertaken by the parties to determine their lateral ocean boundary that the Master erroneously concluded that the decree constituted "mere settlements by the parties acting under compulsion and motives that have no relation to the performance of the Court's Article III functions." Because the decree submitted by Maine and New Hampshire is a final determination of the boundary which was obtained in the proper performance of judicial powers under Article III, as required by this Court in *Vermont v. New York*, we respectfully request the Court to enter the consent decree as originally submitted.

II. THE OBJECTIONS OF THE SPECIAL MASTER SHOULD BE REMEDIED BY REFERRING THE CONSENT DECREE FOR CLARIFICATION.

The Special Master indicates that he rejected the consent decree because "the moving papers do not propose a case or controversy in which the Court might apply 'principles of law or equity to facts distilled by hearings or stipulations.'" (Report pp. 3-4) We believe, however, that the Master's objection is not one of substance but one of form. If this Court determines there is a deficiency which must be corrected at this time, the proper solution is to refer the decree back to the Master to permit the parties to specify the conclusions of law and findings of fact which establish the line they proposed. Public policy does not require the Court to do more.

In this case the parties entered into an original action to decide a long and often angry dispute over the location of their lateral boundary. To that end the parties committed substantial legal and financial resources in cooperation with the Special Master and the United States Government to reach a decision regarding the legal principles and facts required to determine the boundary. The Court should decide this case in a way which encourages such initiative by parties in future cases of original jurisdiction. If the Court adopts this Master's Report, it will deny the States the option to terminate any case of original jurisdiction short of a full trial of the issues. By

foreclosing the States' option to enter consent decrees the Court will require the unnecessary expenditure of time and money in many cases. When the public interest is so directly involved, this Court should not require such results.

III. THE MOST APPROPRIATE LATERAL BOUNDARY IS THE LINE PROPOSED IN THE JOINT CONSENT DECREE.

The State of Maine agrees with the Special Master's decision that the decree issued by the King of England established the boundary between Maine and New Hampshire in the disputed area. (Report, p. 32) Moreover, the State of Maine does not object to the Special Master's decision to divide the line into the following elements:

1. What is meant by the mouth of the Piscataqua Harbor?
2. What is meant by the middle of the river?
3. Where does the line parting the Isles of Shoals begin to run through the middle of the harbor?
4. How shall "the dividing line" proceed between the mouth of the Piscataqua and the Isles of Shoals? (Report p. 32)

The State also agrees with the Master's decision to run a straight line as the portion of the boundary line connecting the mouth of Piscataqua Harbor and the mouth of Gosport Harbor. However, the State does object to the method used by the Special Master to determine the end points of the straight line portion of the boundary. Our position is that thalweg is the only principle which can be used to determine where "mouth of the harbor" meets the "middle of the river" in Piscataqua Harbor and the location of the "middle of the harbor" in Gosport Harbor. The principles used by the Special Master to determine the end points of the line are unsupported by authority and lead to an interpretation which the drafters of the 1740 decree could not have intended.

A. The End Points of the Straight Line Portion of the Lateral Boundary Must be the End Point of the Natural Channel in the Mouth of Both Harbors.

1. The Principles the Master Uses to Determine the Harbor Mouth Must be Rejected.

The 1740 decree provides that the dividing line "shall pass through the mouth of the Piscataqua Harbor and up the mid-

dle of the river" and shall part the Isles of Shoals and run through the middle of the Harbor." There is complete agreement that the dividing line should be drawn from the middle point in each harbor mouth. To locate that point the Special Master has chosen to apply the principle of "geographic middle" to determine the location of the middle of the river described in the decree of 1740. As the next step in his analysis the Special Master concluded that the only meaning of the mouth of the Piscataqua Harbor is "the opening between the seawardmost points of land at which the shore 'turns' as the Piscataqua River flows into the ocean." (Report p. 34) As the final step in his analysis the Special Master located the end points of the straight line portion of the dividing line by fixing the intersection of the "geographic middle" and the closing line drawn across the narbor mouth. (Report pp. 41-44)

The principles utilized by the Special Master cannot be accepted as appropriate to interpret the language of the decree because they create the real danger of a segmented dividing line. This result cannot be permitted because the 1740 decree clearly describes a continuous dividing line.

In the geographic circumstances of this case a reasonable result of the application of the Special Master's principle is that the harbor mouth is located seaward of the river's middle point. Thus, where the land "turns seaward" is a subjective principle which could result in the determination of a harbor mouth located seaward of the termination of the river. Clearly no intersection of the line in the middle of the river with the closing line depicting the harbor mouth could occur if the headlands "turned" at a point seaward of the termination of the river. While it is not disputed that the line determined by the Special Master is continuous, it is clear that a continuous dividing line is not the necessary result of the application of the principles he chose. Absent clear authority in support of the principles applied by the Special Master, they must be rejected.

2. The natural end of the Channel Must Establish the Location of the Harbor Mouth.

a. Thalweg is the only principle which guarantees the continuity of the dividing line.

The 1740 decree provided that the dividing line shall pass up the mouth of Piscataqua Harbor and up the middle of the

River. This line can be continuous only if the river joins the mouth of Piscataqua Harbor. The doctrine of thalweg is the only principle appropriate to interpret the decree because it guarantees that the dividing line will be continuous. Thus locating the harbor mouth at the point where the river channel merges with the ocean guarantees the continuity of the boundary described in the 1740 decree. After extensive surveys undertaken in cooperation with the State of New Hampshire, the State of Maine has determined that the river bottom merges with the ocean bottom at a point intersected by a line drawn from Odiornes Point to Kitts Rocks. For identical reasons the end point of the straight line section must be located at the point where the harbor channel merges with the ocean bottom of Gosport Harbor. These points are the end points of the straight line portion of the boundary in the consent decree submitted by Maine and New Hampshire (App. p. 24).

b. Thalweg is the only principle which is Legally Supportable for Determining the Location of the Harbor Mouth.

The Special Master located the harbor mouth where the headlands "turned" in Portsmouth Harbor and where "shelter" ended in Gosport Harbor. (Report pp. 34, 44) No legal authority was cited by the Special Master for the application of these tests. Thalweg on the other hand is a principle of international law which has gained wide acceptance in determination of State water boundary disputes. *Louisiana v. Mississippi*, 202 U.S. 1, 50 (1906); *Arkansas v. Mississippi*, 250 U.S. 39, 43, 44 (1919); *New Jersey v. Delaware*, 291 U.S. 361, 378-80 (1934). The Special Master rejects thalweg because the line between Maine and New Hampshire "derives from a written boundary decree and not from a pure application of international law principles." (Report p. 41) The decisions of this Court demonstrate that this objection to the application of thalweg is not valid. In *Arkansas v. Tennessee*, 246 U.S. 158, 170-1 (1918), the court applied thalweg to determine the meaning of middle of the river as it was *written* in the Treaty of Peace entered between the United States and Great Britain in 1783. See also *Iowa v. Illinois*, 147 U.S. 1, 10 (1893).

The Master's second objection to thalweg is that it had only germinal existence in 1740. This rejection is contradicted by the practice of the parties before the King's Commission to settle the boundary between the Province of New Hampshire

and Massachusetts Bay.[2] In those proceedings both New Hampshire and Massachusetts applied thalweg doctrine to interpret the language of their royal charters.[3] Moreover, the practice of agencies of United States and New Hampshire establish that the mouth of the harbor is a line which intersects the natural end of the channel. Since 1929 the United States Coast and Geodetic survey has defined the entrance to Portsmouth Harbor as the line joining Odiornes Point and the Kitts Rocks whistle buoy.[4] An identical position was taken by the New Hampshire State Port Authority when it defined the Portsmouth Harbor mouth as a line from Odiornes Point to Flashing Buoy No. 2.[5]

Because the doctrine of thalweg is well supported by the decisions of this Court and is the only principle which guarantees that interpretation of the 1740 decree will result in a continuous dividing line, it should be applied by the Court to determine the "mouth of the harbor" and "middle of the harbor" to which the straight line portion of the boundary is drawn.

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2 "Minutes of the King's Commission to Settle the Boundary Lines between the province of New Hampshire and Massachusetts Bay in New England." Colonial Office America and West Indies original correspondence, Vol. 880, Number 79.

3 Id. at 8-10, 19-22, 24-33, 34-51, 56-70, 73-74, 77-111, 115-122, 132-139, 149.

4 "Tides and Currents in Portsmouth Harbor" special publication No. 150, U.S. Coast and Geodetic Survey, Dept. of Commerce 1929. U.S. Coast Pilot, Atlantic Coast, Eighth Edition, 1971, National Ocean Survey, U.S. Department of Commerce publication, at 199-201.

5 Rules and Regulations Pertaining to Harbors and Tidal Waters of the State of New Hampshire (1971).

CONCLUSION

For the foregoing reasons, this Court should reject the recommendations of the Special Master and enter the decree proposed by the States of Maine and New Hampshire.

Respectfully submitted,

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Dated: December 1975.

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 64, Original

THE STATE OF NEW HAMPSHIRE, *Plaintiff*

v.

THE STATE OF MAINE, *Defendant*

MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

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In the
Supreme Court of the United States

October Term, 1973

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

Come now the State of New Hampshire and the State of Maine by and through their respective counsel and move the Court to enter judgment in this action by consent of the Plaintiff and Defendant as specified hereunder.

Counsel for Plaintiff, namely, the Attorney General of New Hampshire, Warren B. Rudman, the Deputy Attorney General of New Hampshire, David H. Souter, and Special Counsel for New Hampshire, Richard F. Upton, and Counsel for Defendant, the Attorney General of Maine, Jon A. Lund, and Assistant Attorney General Charles R. Larouche, represent to the Court that after long and careful study, they have come to agreement as to the pertinent facts and the applicable legal principles determinative of this action. The aforementioned Counsel have concluded that it is in the best interest of each State and of the Court to dispose of this action by a judgment as specified hereunder.

The aforementioned Counsel assure the Court that the requested disposition of this action has been fully explained to the Governor and Executive Council of each State by its Counsel and that the Governor and Executive Council of each State approve the requested disposition of this action.

WHEREFORE, the Plaintiff and Defendant, by and through their respective Counsel, move the Court to enter the following judgment, each party hereby consenting thereto:

(1) This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor, upon the Complaint, Answer Pretrial Memoranda and agreement of Counsel for New Hampshire and for Maine.

(2) The source of the lateral marine boundary line between New Hampshire and Maine lies in the Order of the King in Council of April 9, 1740, which Order provided:

> "And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments And That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same. . . ."

(3) The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

(4) The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point,

New Hampshire and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cove, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

(5) The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43° 02′ 42.5″ North and longitude 70° 42′ 06″ West. Said point has a computed bearing of 194° 44′ 47.47″ true and a computed distance of 1,554,45 metres (1,700 yards) from the Whaleback Lighthouse, No. 19, USCG-158, whose position is latitude 43° 03′ 31.213″ North and longitude 70° 41′ 48.515″ West (reference National Geodetic Survey).

(6) The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th edition, Dec. 1, 1973. The position of this point is latitude 42° 58′ 51.6″ North and longitude 70° 37′ 17.5″ West as scaled from the above-described chart.

(7) The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42° 58′ 55″ North and longitude 70° 37′ 39.5″ West. Said point has a computed bearing of 349° 08′ 52.81″ true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG-158, whose position is latitude 42° 58′ 01.710″ North and longitude 70° 37′ 25.590″ West (reference National Geodetic Survey).

(8) The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

(9) The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139° 20′ 27.22″ true.

(10) The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination point proceeds toward Piscataqua River channel

termination point on a computed bearing of 319° 17′ 25.43″ true.

(11) All positions in the preceding paragraphs are referred to the North American Datum of 1927.

(12) The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, Eighth Edition, Dec. 1, 1973, filed herewith.

(13) Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. If the parties hereto are unable to agree upon such a stipulation, then upon the expiration of such 180 day period, application shall be made by them, or either of them, to this Court for the appointment of a Commissioner with full power to hear evidence and locate and mark the boundary as settled and make a return of his actions to this Court, the costs of which proceedings shall be shared equally by the two States.

(14) The State of Maine, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the territory adjudged to her by this decree; and the State of New Hampshire, its officers, agents and representatives, its citizens, and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the territory adjudged to her by this decree.

(15) The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

(16) This motion is made by each State without prejudice to its claims concerning its lateral marine boundary with the other, easterly of the Isles of Shoals.

Dated: September , 1974

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 64, Original

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

MOTION TO AMEND MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

Now come The State of New Hampshire and The State of Maine by and through their respective Counsel and move that the Motion for Entry of Judgment by Consent of Plaintiff and Defendant, heretofore filed in the above-entitled action, be amended as follows:

1. Amend the second unnumbered paragraph of the introduction to the body of the Motion, appearing on page 1 of the Motion, so that the same will read as follows:

"Counsel for Plaintiff, namely, the Attorney General of New Hampshire, Warren B. Rudman, the Deputy Attorney General of New Hampshire, David H. Souter, and Special Counsel for New Hampshire, Richard F. Upton, and Counsel for Defendant, the Attorney General of Maine, Jon A. Lund, and Assistant Attorney General Charles R. Larouche, represent to the Court that after long and careful study of the issues in dispute and the Complaint, the Answer, the Pretrial Memoranda and applicable principles of constitutional and international law, they have come to agreement as to the pertinent facts and the applicable legal principles determinative of this

action. The aforementioned Counsel have concluded that it is in the best interest of each State and of the Court to dispose of this action by a judgment as specified hereunder."

2. Amend paragraph (1) of the Motion by striking out all after the words "Gosport Harbor" so that said paragraph (1) as amended shall read as follows:

"(1) This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor."

3. Amend paragraph (2) of the Motion by striking out the same and inserting in place thereof the following new paragraph:

"(2) The Order of the King in Council of April 9, 1740, in pertinent part, provided:

"And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments and That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of the said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in and be accounted part of the Province of the Massachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same. . ."

4. Amend said Motion by renumbering the present paragraphs (8), (9), (10), (11), (12), (13), (14), (15) and (16)

as (9), (10), (11), (12), (13), (14), (15), (16) and (17) and by inserting the following new paragraph (8):

"(8) The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (5) and (7) above has been determined on the basis of the 'special circumstances' exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U. S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two states in their colonial grants and charters."

5. Amend paragraph (14) of the Motion (now paragraph (15) as renumbered) by striking out said paragraph and inserting in place thereof the following new paragraph:

"(15) The State of Maine, its officers, agents, representatives, and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives, and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree."

Dated this 21st day of October, 1974.

WARREN B. RUDMAN
Attorney General of New Hampshire

DAVID H. SOUTER
Deputy Attorney General of New Hampshire

RICHARD F. UPTON
Special Counsel
Counsel for Plaintiff
The State of New Hampshire

JON A. LUND
Attorney General of Maine

CHARLES R. LAROUCHE
Assistant Attorney General of Maine
Counsel for Defendant
The State of Maine

UPTON, SANDERS & UPTON

10 Centre Street

Concord, N. H. 03301

November 1, 1974

Hon. Tom C. Clark
Supreme Court Justice (Retired)
U. S. Supreme Court Building
Washington, D. C. 20543

Re: No. 64, Original, New Hampshire vs. Maine.

Dear Mr. Justice Clark:

The parties have prepared a proposed draft of a final decree in the event that favorable consideration is given to their motion for entry of judgment by consent of the parties. We enclose twelve copies of the same for your consideration. This draft has been examined and approved by Charles Larouche, Esq., Assistant Attorney General of Maine, as conforming to the motion and the intention of the parties.

Copies of this letter and enclosures have been sent to Mr. Larouche.

Very truly yours,
Richard F. Upton

RFU/mph

Enclosures

cc: Charles Larouche, Esq.

Hon. David Souter

Deputy Attorney General

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 64, Original

THE STATE OF NEW HAMPSHIRE, Plaintiff

vs.

THE STATE OF MAINE, Defendant

JUDGMENT AND DECREE

This cause, having been submitted upon the pleadings, pretrial memoranda, motion for entry of judgment by consent of Plaintiff and Defendant, and upon the Report of the Special Master thereon;

It is now ordered, adjudged and decreed as follows:

1. The Report of the Special Master is hereby approved, and the motion for entry of judgment by consent of Plaintiff and Defendant is granted.

2. This judgment determines the lateral marine boundary line between New Hampshire and Maine from the inner Portsmouth Harbor to the breakwater at the end of the inner Gosport Harbor in the Isles of Shoals.

3. The Order of the King in Council of April 9, 1740, in pertinent part, provided:

> "And as to the Northern Boundary between the said Provinces, the Court Resolve and Determine, That the Dividing Line shall pass up thrô the Mouth of Piscataqua Harbour and up the Middle of the River into the River of Newichwannock (part of which is now called Salmon Falls) and thrô the Middle of the same to the furthest Head thereof and from thence North two Degrees Westerly until One Hundred and Twenty Miles be finished from the Mouth of Piscataqua Harbour aforesaid or until it meets with His Majestys other Governments and That the Dividing Line shall part the Isles of Shoals and run thrô the Middle of the Harbour between the Islands to the Sea on the Southerly Side; and that the Southwesterly part of said Islands shall lye in and be accounted part of the Province of New Hampshire And that the North Easterly part thereof shall lye in, and be accounted part of the Province of the Masachusetts Bay and be held and enjoyed by the said Provinces respectively in the same manner as they now do and have heretofore held and enjoyed the same. . . ."

4. The terms "Middle of the River" and "Middle of the Harbour," as used in the above-quoted Order, mean the middle of the main channel of navigation of the Piscataqua River and the middle of the main channel of navigation of Gosport Harbor.

5. The middle of the main channel of navigation of the Piscataqua River, commencing in the vicinity of Fort Point, New Hampshire and Fishing Island, Maine, proceeding southward, is as indicated by the range lights located in the vicinity of Pepperrell Cove, Kittery Point, Maine, and it follows the range line as marked on the Coast and Geodetic Survey Chart 211, 8th Edition, Dec. 1, 1973.

6. The main channel of navigation of the Piscataqua River terminates at a point whose position is latitude 43° 02′ 42.5″ North and longitude 70° 42′ 06″ West. Said point has a computed bearing of 194° 44′ 47.47″ true and computed distance of 1,554.45 metres (1,700 yards) from the Whaleback Lighthouse, No. 19, USCG-158, whose position is latitude 43° 03′ 31,213″ North and longitude 70° 41′ 48.515″ West (reference National Geodetic Survey).

7. The middle of the main channel of navigation of Gosport Harbor passes through a point indicated by the bottom of the BW "IS" Bell Buoy symbol as shown on Coast and Geodetic Survey Chart 211, 8th edition, Dec. 1, 1973. The position of this point is latitude 42° 58′ 51.6″ North and longitude 70° 37′ 17.5″ West as scaled from the above-described chart.

8. The main channel of navigation of Gosport Harbor terminates at a point whose position is latitude 42° 58′ 55″ North and longitude 70° 37′ 39.5″ West. Said point has a computed bearing of 349° 08′ 52.81″ true and a computed distance of 1,674.39 metres (1,831 yards) from the Isles of Shoals Lighthouse, No. 20, USCG-158, whose position is latitude 42° 58′ 01.710″ North and longitude 70° 37′ 25.590″ West (reference National Geodetic Survey).

9. The lateral marine boundary between New Hampshire and Maine connecting the channel termination points described in paragraphs (6) and (8) above has been determined on the basis of the "special circumstances" exception to Article 12 of the Convention on the Territorial Sea and the Contiguous Zone (15 U. S. Treaties 1608) and of the location of the Isles of Shoals which were divided between the two states in their colonial grants and charters.

10. The lateral marine boundary line between New Hampshire and Maine connecting the channel termination points described above is the arc of a great circle (appears as a straight line on a Mercator projection) whose computed length is 9,257.89 metres (10,124.53 yards).

11. The lateral marine boundary line between New Hampshire and Maine from the Piscataqua River channel termination point proceeds toward Gosport Harbor channel termination point on a computed bearing of 139° 20′ 27.22″ true.

12. The lateral marine boundary line between New Hampshire and Maine from the Gosport Harbor channel termination point proceeds toward Piscataqua River channel termination point on a computed bearing of 319° 17′ 25.43″ true.

13. All positions in the preceding paragraphs are referred to the North American Datum of 1927.

14. The boundary line delimited hereinabove is depicted by a heavy black line with the words "Maine" and "New Hampshire" above and below that line on the Coast and Geodetic Survey Chart 211, Eighth Edition, Dec. 1, 1973, filed with the Motion for Entry of Judgment by Consent.

15. Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any

applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. If the parties hereto are unable to agree upon such a stipulation, then upon the expiration of such 180 day period, application shall be made by them, or either of them, to this Court for the appointment of a Commissioner with full power to hear evidence and locate and mark the boundary as settled and make a return of his actions to this Court, the costs of which proceedings shall be shared equally by the two States.

16. The State of Maine, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of New Hampshire over the area adjudged to her by this decree; and the State of New Hampshire, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Maine over the area adjudged to her by this decree.

17. The costs of this action shall be equally divided between the two States, and this case is retained on the docket for further orders, in fulfillment of the provisions of this decree.

By the Court

UPTON, SANDERS & SMITH

10 Centre Street

Concord, N. H. 03301

November 7, 1974

Hon. Tom C. Clark
Supreme Court Justice (Retired)
U. S. Supreme Court Building
Washington, D. C. 20543

Re: No. 64, Original, New Hampshire v. Maine

Dear Mr. Justice Clark:

I believe you have already received a copy of letter from the Department of Justice to myself and Mr. Larouche, Assistant Attorney General of Maine, dated November 4. Both of us would like to have the original letter made a part of the record in this case and the same is enclosed.

A copy of this letter has been sent to Mr. Larouche.

Very truly yours,

Richard F. Upton

RFU/mph

Enclosure

cc: Charles R. Larouche, Esq.
Assistant Attorney General
State House
Augusta, Maine 04330

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C. 20530

November 4, 1974

Address Reply to the
Division Indicated
and Refer to Initials and Number
MWR:RJG
90-4-19

Charles R. Larouche, Esquire
Assistant Attorney General
State of Maine
Augusta, Maine 04330

Dear Mr. Larouche:

Re: New Hampshire v. Maine, S. Ct.,
No. 64, Original

Thank you for your letter of October 25, 1974, enclosing a copy of the Motion to Amend the Motion for Entry of Judgment by Consent of the parties in the above-captioned case. We understand that this amending motion was filed with the Special Master by mailing dated October 24, 1974.

The purpose of this letter is to confirm that the Department of Justice was consulted concerning the text of the amending motion and will have no objection to the granting of the amended motion for entry of judgment by consent.

Thank you for your cooperation.

Sincerely,
Assistant Attorney General
Land and Natural Resources Division
By:
Ralph J. Gillis
Attorney, Marine Resources Section

cc: Honorable Thomas C. Clark
Associate Justice (Ret.)
Supreme Court of the United States
Washington, D. C. 20543
Richard F. Upton, Esquire
Special Counsel
10 Centre Street
Concord, New Hampshire 03301